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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/614,312	07/07/2003	W. John Gardenier	1442.041	8270
23405	7590	08/17/2006	EXAMINER	
HESLIN ROTHENBERG FARLEY & MESITI PC 5 COLUMBIA CIRCLE ALBANY, NY 12203			LE, HUYEN D	
			ART UNIT	PAPER NUMBER
			3751	

DATE MAILED: 08/17/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/614,312

Applicant(s)

GARDENIER, W. JOHN

Examiner

Huyen Le

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 05 June 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-9, 11, 23-39, 41, 42 and 56-61 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9, 11, 23-39, 41, 42 and 56-61 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 102***

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-4, 6-8, 11, 23-27, 29-38, 41, 42, 55-57, 60 and 61 are rejected under 35 U.S.C. 102(b) as being anticipated by Tobias et al (5,115,974).

The Tobias et al reference discloses a system for providing pressurized water to a set of water inlets 62 in a bathing enclosure comprising: a portion of the horizontal surface 16 (on the left of unit 10 in Fig. 1) on which a user can sit constitutes a seat at an elevation, a foot well position below the elevation; a least one of a source of pressurized water 30; at least one manifold 52 having at least one inlet in fluid communication with the source of pressurized water 30 and a plurality of outlets 60 in fluid communication with the set of water inlets 62; and a user-operable diverter 38 distinct from the manifold 52 configured to divert at least some of the pressurized water away from the water inlet and to the foot well below.

Regarding claims 2, 13, the user-operable diverter 38 is positioned upstream of the manifold 52.

Regarding claims 3, 14, the user-operable diverter 38 comprises a variable user-operable diverter.

Regarding claims 4, 15, the set of water inlets 62 comprise a plurality of first water inlets having a first pressure drop to the flow of water therethrough, and wherein the bathing enclosure comprises at least one second water inlet 36 comprising a second pressure drop to the flow of water therethrough, wherein the user-operable diverter diverts at least some of the pressurized water to the at least one second water inlet 36 of the bathing enclosure wherein the second pressure drop is less than the first pressure drop because first water inlets 62 comprises a plurality of openings.

Regarding claims 6, 17, the system further comprises at least one conduit 24 between the source of pressurized water 30 and the manifold inlet 52, wherein the user-operable diverter 38 is in fluid communication with the conduit 24.

Regarding claims 7, 18, the system further comprises at least one conduit (channel) positioned between the manifold outlet 60 and the set of water inlets 62.

Regarding claims 8, 19, the user-operable diverter 38 comprises a valve.

Regarding claims 10, 21, the bathing enclosure comprises at least one foot well, wherein the user-operable diverter 38 diverts water to the one foot well.

Regarding claims 11, 22, the bathing enclosure comprises a pool.

Regarding claims 23-34, the method for pressurizing water to a set of water inlets in a bathing enclosure is inherently performed during the installation and normal use of the system.

Regarding claim 35, the system includes a one single speed pump.

Regarding claim 37, the valve 38 is a variable pressure relief valve.

Regarding claim 40, the bathing enclosure comprises at least one foot well, wherein the user-operable diverter 38 diverts water to the one foot well.

Regarding claim 41, the set of water jets 62 is located in one seat surface 16.

Regarding claim 42, the bathing enclosure comprises a pool.

Regarding claim 55, the surface 16 comprises a plurality of portions joined by a connector therebetween, the plurality of portions 16 constitute a plurality of seats.

Regarding claim 56, the set of water inlets are positioned above the seat elevation (surface portion 16).

Regarding claim 57, the manifold 60 comprises a plenum into which the least one inlet discharges water and from which water is distributed to the plurality of outlets 60.

### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 5 and 31 rejected under 35 U.S.C. 103(a) as being unpatentable over Tobias et al (5,115,974).

Although the Tobias et al reference does not specifically disclose that the second pressure drop of the second water inlet is at least 50 percent less than the pressure drop across the first set of water inlets, it would have been obvious to one of ordinary

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skill in the art at the time the invention was made to select pressure drop for the second inlet within a certain range to best fit a particular a water system for a bathing device and to optimize the performance. See *In re Aller*, 105 USPQ 233, using the optimum or workable ranges involves only routine skill in the art.

5. Claims 9 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tobias et al (5,115,974).

Although the Tobias et al reference shows only one manifold for creating water effect having one pump and one diverting valve, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide more than one Tobias water manifolds with pumps and diverting valves to further enhance water effect a swimming pool. See *St. Regis Paper Co. v. Bemis Co.* 193 USPQ 8 (duplication of parts for enhanced effect involves only routine skill).

6. Claims 1-4, 6-9, 11, 23-27, 29, 30, 32-39, 41, 42, 55-61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ruderian (3,374,492) in view of Friend (3,641,996).

The Ruderian reference discloses a system for providing pressurized water to a set of water inlets 27,28,29, 30 in a bathing enclosure comprising: at least one seat 25 at an elevation, a foot well position below the elevation; a least one of a source of pressurized water 42; at least one manifold 41 having at least one inlet in fluid communication with the source of pressurized water 42 and a plurality of outlets in fluid communication with the set of water inlets 27,28,29, 30.

Although Ruderian does not disclose that the system comprise a user-operable diverter 38 for divert at least some of the pressurized water away from the water inlet and to the foot well below, attention is direct to the Friend reference which teaches at least one user-operable diverter 13.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the Ruderian bathing system with at least one user-operable diverter in view of the teaching of the Friend reference for divert at least some of the pressurized water away from the water inlet and to the foot well below.

7. Claims 5 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ruderian (3,374,492) in view of Friend (3,641,996).

Although the Ruderian reference does not specifically disclose that the second pressure drop of the second water inlet is at least 50 percent less than the pressure drop across the first set of water inlets, it would have been obvious to one of ordinary skill in the art at the time the invention was made to select pressure drop for the second inlet within a certain range to best fit a particular a water system for a bathing device and to optimize the performance. See *In re Aller*, 105 USPQ 233, using the optimum or workable ranges involves only routine skill in the art.

### ***Response to Arguments***

8. Applicant's arguments filed 06/05/2006 have been fully considered but they are not persuasive.

Applicant's allegations with respect to the Tobias reference that the coping 16 is not a "seat" and the pool is not a "footwell" have been noted but there is not enough

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evidence to support those. The claimed "seat" and "footwell" structures have been met by the structures of the members 16 and 12 of Tobias which are capable of being used as a seat and a footwell.

In regard to applicant's arguments that the inlet structures 62 of Tobias et al are not "inlets in a bathing enclosure" as claimed, examiner disagrees with applicant. Since the "water inlets in a bathing enclosure" are in the preamble and not positively recited in claim 1, the water inlets are not considered as part of the claimed invention. Therefore, the claimed structures have been met by Tobias et al. Furthermore, the inlets 62 of Tobias et al are considered "in" the bathing enclosure 12 relative to the exterior surface of wall 12 if looking from the top down or from the side.

In regard to applicant's arguments that there is not teaching, suggestion or motivation to combine the Ruderian and Friend and the combination of these references is hindsight to produce the present invention, examiner disagrees with applicant.

Ruderian teaches a system for providing pressurized water to a bathing enclosure but not a diverting valve. Friend teaches a diverting valve in a bathing tub for controlling water to different area of the tub. Since Ruderian and Friend in the same bath art, it would have been obvious to one of ordinary skill in the art at to combine Ruderian and Friend. The motivation is in the knowledge generally available to one of ordinary skill in the art.

In regard to applicant's arguments that a step 24 of Ruderian is not a "seat" and the bottom of the tub is not a "footwell" as claimed, examiner disagrees with applicant. The introductory statement and all other functional statements of the intended use in the



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claims have been carefully considered but deemed not to impose any structural limitations on the claims distinguishable over the structures 25 and the bottom of the Ruderian tube which are capable of being used as a "seat" and a "footwell".

### ***Conclusion***

9. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Huyen Le whose telephone number is 571-272-4890. The examiner can normally be reached on Monday-Friday from 9:00 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Justine Yu can be reached on 571-272-4835. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Huyen Le  
Examiner  
Art Unit 3751

August 16, 2006